UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

KELCI STRINGER, Plaintiff, v. NATIONAL FOOTBALL LEAGUE, et al., Defendants.	Case No. 2:03-cv-665 Judge Holschuh Magistrate Judge Abel

SUPPLEMENTAL MEMORANDUM IN SUPPORT OF THE NFL DEFENDANTS' MOTION TO DISMISS

In this memorandum, submitted at the Court's request, we address the two theories of liability, each of which is preempted by Section 301 of the Labor Relations Management Act, 29 U.S.C. § 185, that Plaintiff has advanced against the NFL Defendants.

Plaintiff's first theory, reflected in the First Claim For Relief, alleges (a) that the NFL had a duty to provide Mr. Stringer a safe workplace, as well as medical care for the prevention and treatment of heat illness, and (b) that the NFL breached that "duty" by failing adequately to regulate the member clubs' training camps. Plaintiff has attempted to recast this cause of action as one focusing on the "Hot Weather Guidelines" from the 2001 NFL Game Operations Manual. But the Game Operations Manual regulates only the conduct of NFL games; it has nothing to do with the member clubs' training camps.

In any event, resolution of the First Claim for Relief, including any claim based upon the "Hot Weather Guidelines," would require interpretation of the Collective Bargaining Agreement; accordingly, that claim is preempted. Interpretation of the CBA would be required for two independent reasons:

(1) The legal standard prescribed by the Restatement (Second) of Torts § 324A(b), upon which Plaintiff now purports to rely, requires a determination of whether the NFL's alleged "voluntary undertaking" -- an undertaking presumably based upon publication of the "Hot Weather Guidelines" in the Game Operations Manual -- "completely supplanted" any duties owed, pursuant to the CBA, by Clubs to their player-employees; and

(2) Plaintiff continues to invoke rights, and to allege breaches of duties, arising from the CBA. We address these issues at pages 9-14, below.

Plaintiff's second theory, reflected in her Fourth Claim for Relief, accuses the NFL and NFL Properties of negligently "requiring and/or approving" the wearing of helmets and shoulder pads manufactured by Riddell. As a threshold matter, to the extent that this claim is coupled with the workplace/healthcare claim addressed above, it is necessarily preempted. But we also demonstrate, at pages 6-7 and 14-16, below, that the Fourth Claim for relief is based on fundamentally incorrect premises. There was, and never has been, any such "requirement" or "approval." Neither the NFL nor NFL Properties has "required" or "approved" players' wearing Riddell helmets or shoulder pads in the clubs' training camps; neither the NFL nor NFL Properties requires players to wear any helmets or shoulder pads in clubs' training camps; indeed, the NFL and NFL Properties do not even limit the helmets or shoulder pads that players may choose to wear in NFL games.

Before turning in detail to the subjects summarized above, we note that Plaintiff's counsel have informed us that they intend voluntarily to dismiss the single claim against Dr. Lombardo (the Second Claim for Relief). Discovery, including a deposition of Dr. Lombardo, confirmed our representation to the Court that he had nothing to do with publication or approval of the "Hot Weather Guidelines" and was not otherwise involved in the events at issue here; accordingly, we do not address the claim against Dr. Lombardo.

REVIEW OF BACKGROUND FACTS

A. Procedural History

Plaintiff's Complaint asserts a claim for wrongful death resulting from the death of Korey Stringer at the Minnesota Vikings' training camp. Compl. ¶ 4. The Complaint alleges that the NFL Defendants "failed to take steps … to reduce the risk of [heat-related] illness" (id. ¶ 15) and, inter alia:

- "failed to establish practice regulations and procedures for hot and/or humid conditions";
- "failed to establish procedures to ensure the proper acclimatization of all players before they participate in full practices";
- "failed to establish practices and, procedures, or even make recommendations to member clubs such as the Vikings for the adequate care and monitoring of players suffering heat-related illness";
- "failed to require that an adequate heat-related illness history be taken by those providing medical services and/or examinations to players"; and
- "forced [players] to submit to a substandard medical system within the NFL that is composed of athletic trainers, team physicians, and others who are not competent or adequately trained to recognize or treat heat-related illness."

Id. ¶ 21(a)-(d), (h) (emphases added); see id. at First Claim for Relief. The Complaint also asserted a negligence claim against the NFL and NFL Properties for "requiring and/or approving the use of Riddell's helmets and shoulder pads." Id. ¶ 66 & Fourth Claim for Relief; see id. ¶ 2 (alleging that Stringer was "forced to participate fully in practices ... while wearing unsafe, heat-retaining, league-mandated equipment").

The NFL Defendants moved to dismiss the Complaint on the ground that Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, preempted the action, because resolution of Plaintiff's claims would require interpretation of the CBA, and because Plaintiff was attempting to enforce rights that arose, if at all, from the CBA. The NFL Defendants pointed out that resolution of plaintiff's claims would require interpretation

of CBA provisions governing the duties owed to NFL players by team trainers and team physicians, as well as CBA duties governing players' rights to medical care and pre-season physicals. See NFL Defs.' Mot. to Dismiss at 3-7, 9-14; NFL Defs.' Reply at 1-2 & n.2.

At oral argument, counsel for Plaintiff argued that, notwithstanding the Complaint's repeated allegations that the NFL Defendants had failed to act with respect to heat-related injuries and illnesses, her theory of relief was instead predicated upon "Hot Weather Guidelines" published in the 2001 NFL Game Operations Manual. Plaintiff contended that by including the "Hot Weather Guidelines" in the Game Operations Manual, the NFL had assumed a duty to NFL players with respect to the prevention and treatment of heat-related injuries in the clubs' training camps, thereby exposing the League to liability under Restatement (Second) of Torts § 324A(b). See Tr. of Oral Argument at 42:15-20 (Plaintiff's Counsel: "We are suing under the [Hot Weather] guidelines because the Vikings placed [Mr. Stringer] in peril and owed him a duty to perform medical services for him. The NFL [unintelligible] to itself the responsibility to prescribe what medical services or health care services, loosely speaking, the player would receive, and they were grossly inadequate. That's why we say 324A, prong [b].").[1]

B. The 2001 Game Operations Manual and Hot Weather Guidelines

The Hot Weather Guidelines constitute less than two pages of the 350+ page Game Operations Manual, by which the League regulates and makes uniform the conduct of NFL Games. See Declaration of Tim Davey ("Davey Decl."), at ¶¶ 2-3 & Ex. A. The express purpose of the Game Operations Manual is to promote the "NFL Rule of Equity," which provides:

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[1] The transcript of the oral argument is submitted as Exhibit A to the accompanying Declaration of Benjamin C. Block.

> The home club, under its responsibility as the club in control, is obligated to grant the visiting club all practical equity in any consideration that could affect competitive factors on game day. This includes locations, equipment and conveniences in the locker room, the bench area, the coaching booth and the video taping positions. It also applies to day-before workouts and pregame warmup procedures.

Id. ¶ 2 & Ex. A at p. A1.[2] The Hot Weather Guidelines appear in the chapter entitled "General Game Procedures" and come after discussion of topics such as on-field security, bench and field access, crowd noise, officiating criticism, and halftime. See id. ¶ 3 & Ex. A. Other subjects addressed in the Game Operations Manual include playing field specifications, field equipment, and game procedures. Id.

The Game Operations Manual does not purport to regulate the clubs' preseason training camps. Indeed, the NFL does not regulate preseason training camps in any way; training camps are the province of the individual member clubs, except to the extent governed by the CBA. Id. ¶ 4. Clubs are free, for example, to conduct training camps at any location, even outside their home territory, indoors or outdoors, and in any manner that they choose. The CBA prescribes the report dates for training camps, along with terms regarding room, board, per diem allowances, expenses, and access to telephones, but otherwise the conduct and administration of each club's training camp is entirely within the discretion of that individual club. See CBA Art. XXXVII.

C. Rules Regarding Helmets and Shoulder Pads

Neither the NFL nor NFL Properties prescribes the helmets or shoulder pads that must or may be worn during NFL games, let alone at the member clubs' training camps. See Davey Decl. ¶¶ 6-8; Declaration of Gary M. Gertzog ("Gertzog Decl.") ¶¶ 4, 7. (NFL

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[2] The Court can consider the Hot Weather Guidelines and the Game Operations Manual on the NFL Defendants' Motion To Dismiss because Plaintiff necessarily relies upon them. See Weiner v. Klais & Co., 108 F.3d 86, 89 (6th Cir. 1997).

Properties engages exclusively in commercial development of the NFL's trademarks, and has nothing to do with the questions at issue here. Id. ¶¶ 2, 7.)

There has never been any requirement that NFL players wear Riddell helmets or shoulder pads, even in NFL games. See Davey Decl. ¶¶ 6-8. To the contrary, the Official Playing Rules of the NFL, which are reprinted in the Game Operations Manual, provide only that during games players must wear helmets or shoulder pads produced "by a professional manufacturer." See id. ¶¶ 6-7 & Exs. A & B.

The Official Playing Rules are incorporated by reference into the NFL Constitution and Bylaws: "The playing Rules of the League shall be those set out in the Official Playing Rules of the National Football League." Davey Decl. ¶ 10 & Ex. C (NFL Const. Art. 11.1.). And in the CBA, the Players' Association agreed that no member of its bargaining unit (which included Mr. Stringer) "will sue … the NFL or any Club relating to the presently existing provisions of the Constitution and Bylaws of the NFL as they are currently operative and administered …." CBA Art. IV, § 2.[3]

The CBA requires that the NFL give the Players' Union "notice of all proposed playing rule changes" and provides that the NFLPA may initiate an arbitration proceeding under the CBA if it believes a rule change "would adversely affect player safety." Id., Art. XIII, § 1(c); see generally id., Art. I, § 1(i) (defining "NFL Rules"). These provisions are in addition to Article XIII, § 1(a), which creates a Joint Committee of labor and management representatives to "discuss[] the player safety and welfare aspects of playing equipment."

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[3] The CBA is an exhibit to the Declaration of Dennis Curran, submitted with the NFL Defendants' Motion To Dismiss.

GOVERNING LEGAL PRINCIPLES

A. LMRA Preemption

To determine whether Plaintiff's claim is preempted by the LMRA, this Court must first determine "whether resolving the state-law claim would require interpretation of the terms of the collective bargaining agreement. If so, the claim is preempted." Mattis v. Massman, 355 F.3d 902, 906 (6th Cir. 2004). "Second," the Court "must ascertain whether the rights claimed by the plaintiff were created by the collective bargaining agreement, or instead by state law." Id. "If the rights were created by the collective bargaining agreement, the claim is preempted. In short, if a state-law claim fails either of these two requirements, it is preempted by § 301." Id. In making this determination, the Court is not bound by the "well-pleaded complaint" rule, but instead "looks to the essence of the plaintiff's claim." DeCoe v. Gen. Motors Corp., 32 F.3d 212, 216 (6th Cir. 1994).

B. Restatement of Torts § 324A(b)

Restatement (Second) of Torts § 324A(b), upon which Plaintiff now relies in an effort to avoid preemption, provides:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking if … he has undertaken to perform a duty owed by the other to the third person.

In order to prevail on this theory, Plaintiff would have to demonstrate that the NFL Defendants undertook to perform duties owed by another -- presumably the Minnesota Vikings, including their trainers and club physicians -- to a "third person," in this case, the Vikings' employee, Mr. Stringer.

The law is well settled that a claim under Section 324A(b) requires proof that defendants "undertook not merely to supplement" another's duties, "but rather to supplant" them. Blessing v. United States, 447 F. Supp. 1160, 1194 (E.D. Pa. 1978) (Becker, J.) (emphasis added); see also Schindler v. United States, 661 F.2d 552, 561-62 (6th Cir. 1981) (Judge Becker's Blessing analysis is "[a]n example of the appropriate type of analysis under Section 324A"); Myers v. United States, 17 F.3d 890, 903 (6th Cir. 1994) (claim predicated on Mine Safety and Health Administration's inspection of mines would require Court to find that MSHA "supplanted" the mine-owner's "responsibility" to provide a safe workplace). Accord, e.g., Hutcherson v. Progressive Corp., 984 F.2d 1152, 1156 (11th Cir. 1993) ("[T]o be liable under section 324A(b), [the defendant] must completely assume a duty owed by [the third party] to [the plaintiff].") (emphasis added); Doe v. Pro-Teck Security, Inc., No. CX-97-1388, 1997 WL 769503, at *2-3 (Minn. Ct. App. Dec. 16, 1997) (security firm had no liability to plaintiff assaulted at a hotel when it provided recommendations to the hotel but did not "agree to undertake [the hotel's] recognized duty to protect residents … such as providing security personnel or installing security equipment"); Flynn v. Hewlynn Nurseries, Inc., 735 N.Y.S.2d 620, 621 (N.Y. Sup. Ct. App. Div. 2001) (dismissing negligence claim because snow removal company's "limited contractual undertaking to remove snow … was not a comprehensive and exclusive … obligation intended to displace the school district's duty as landowner to safely maintain the property").[4]

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[4] Citations to decisions from Minnesota (where Mr. Stringer died) and New York (where the NFL's headquarters is located and the Game Operations Manual was published) are included because, to the extent that state law has any application here, the law of one of those jurisdictions would apply. See Bowman v. Koch Transfer Co., 862 F.2d 1257, 1259-60 (6th Cir. 1988) (court should apply the law of the State where the wrongful death occurred, unless some other state has a more significant relationship to the occurrence and the parties).

The law is also well-settled that potential liability from a voluntary undertaking is strictly limited to the scope of the duty assumed: "The scope of this undertaking defines and limits an actor's duty under section 324A." McAtee v. Fluor Constructors Int'l, Inc., 188 F.3d 508 (Table), 1999 WL 685928, at *6 (6th Cir. Aug. 27, 1999) (quoting In re TMJ Implants Prods. Liab. Litig., 113 F.3d 1484, 1493 (8th Cir. 1997) (in turn citing numerous cases to the same effect)). Accord Eaves Brooks Costume Co. v. Y.B.H. Realty Corp., 556 N.E.2d 1093, 1096-97 (N.Y. 1990); Funchess v. Cecil Newman Corp., 632 N.W.2d 666, 675-76 (Minn. 2001).

ARGUMENT

I. The Hot Weather Guidelines Cannot Salvage Plaintiff's Preempted Claims Because (1) They Have No Application To Clubs' Preseason Training Camps And (2) They Cannot Reasonably Be Read To Supplant Completely The Clubs' Obligations To Provide Medical Care Or A Safe Workplace.

As a threshold matter and as a matter of law, any claim under Section 324A(b) must be limited strictly to the scope of any voluntary undertaking on the part of the NFL Defendants. See pp. 7-9, supra. Thus, if the undertaking arose from publishing the Hot Weather Guidelines in the Game Operations Manual, Plaintiff's claim would necessarily be limited both (a) in context, i.e., to NFL games and (b) in substance, i.e., to the suggestions set forth in the Guidelines, which cannot reasonably be read to completely "supplant" a club's obligations to provide either (i) a safe workplace in its training camp or (ii) medical care for players, even with regard to heat-related issues.

Plaintiff does not allege that Mr. Stringer was injured in an NFL game; instead, plaintiff alleges injury resulting from events at a club's preseason training camp, the conduct of which is regulated exclusively by the club, except to the extent regulated by the Collective Bargaining Agreement. As previously demonstrated, the Game Operations Manual, in which the Hot Weather Guidelines appear, has no application whatsoever to

clubs' preseason training camps. Accordingly, the Hot Weather Guidelines cannot supply the predicate for overcoming the statutory command that claims of this kind are preempted.

II. Even If The "Hot Weather Guidelines" Had Some Application Here, Plaintiff's Claims Would Still Be Preempted Because (1) Interpretation of the CBA Would Be Necessary to Determine Whether, And To What Extent, The Guidelines Had Preempted Any Club Obligations Under the CBA, and (2) Because Plaintiff Continues To Assert Theories of Liability Assertedly Arising From Duties Imposed By The CBA.

Even if the Hot Weather Guidelines had some application here, Plaintiff's claims would still be preempted by Section 301 of the LMRA. The claims fail both prongs of the DeCoe/Mattis two-step inquiry.

A. Resolution of Any Claims Regarding the Guidelines Would Require Interpretation of the CBA.

Even if guidelines published in the Game Operations Manual had any application to the non-game circumstances of individual clubs' preseason training camps, Plaintiff's claims would still be preempted because they would require interpretation of a host of provisions of the CBA, if for no other reason than to determine whether the NFL's asserted voluntary undertaking "completely supplanted" duties owed, pursuant to the CBA, by NFL clubs to their player-employees.

In order to determine whether, by issuing the Hot Weather Guidelines, the NFL Defendants "completely supplanted" any duties of the Vikings to provide a safe workplace or duties with regard to the prevention of and care for heat-related injuries, the Court would have to interpret numerous provisions of the CBA; this is so, among other reasons, because of Plaintiff's allegation that "[t]he NFL required Korey Stringer … to participate fully in training camp and to submit to the medical care provided and deemed necessary by member clubs." Compl. ¶ 16. Duties that might be "supplanted" by the asserted "undertaking" include those arising from the following CBA provisions:

- Article XLIV, § 1: "Each Club will have a board-certified orthopedic surgeon as one of its Club physicians. … If a Club physician advises a coach or other Club representative of a player's physical condition which adversely affects the player's performance or health, the physician will also advise the player. If such condition could be significantly aggravated by continued performance, the physician will advise the player of such fact in writing before the player is again allowed to perform on-field activity.";

- Article XLIV, § 2: "All full-time head trainers and assistant trainers hired after the date of execution of this Agreement will be certified by the National Athletic Trainers Association. All part-time trainers must work under the direct supervision of a certified trainer.";

- Article XLIV, § 5: "Each player will undergo a standardized minimum pre-season physical examination, outlined in Appendix I attached hereto, which will be conducted by the Club physician.";

- Article XXXV, § 6: "During the ten consecutive days immediately prior to the mandatory veteran reporting date for each Club's pre-season training camp … no veteran player …. shall be permitted to participate in any organized workouts or other organized football activity of any kind … in connection with or on behalf of the Club or Club Affiliate.";

- Article XXXVII, § 5: "No veteran player … will be required to report to a Club's official pre-season training camp earlier than fifteen (15) days (including one day for physical examinations) prior to its first scheduled pre-season game or July 15, whichever is later.)";

- NFL Player Contract (CBA App. C):

  - ¶ 2: "Player will report promptly for and participate fully in Club's official mandatory minicamp(s), official preseason training camp ….": and

  - ¶ 8: "Player represents to Club that he is and will maintain himself in excellent physical condition. Player will undergo a complete physical examination by the Club physician upon Club request ....".

See also Compl. ¶¶ 17 (discussing Club athletic trainers), 18 (discussing Club physicians), 19 (discussing timing of practices).

Which, if any, of the club duties reflected in the foregoing provisions was "completely supplanted" by the NFL's printing the Hot Weather Guidelines in the Game Operations Manual? In order to answer that question, the Court would have to determine, among other things:

- whether and to what extent the CBA requirement that club trainers be certified by the National Athletic Trainers Association encompasses responsibility for the prevention and treatment of heat-related injuries;

- whether and to what extent the CBA requirement that a club have team physicians encompasses responsibility for the prevention and treatment of heat-related injuries;

- whether and to what extent heat-related injuries or illnesses were within the scope of the CBA-required pre-season examination;

- whether and to what extent the CBA requirement that club physicians inform the player and coaches if injuries or illnesses "could be significantly aggravated by continued performance" encompasses heat-related injuries or illnesses; and

- whether and to what extent the CBA provisions regarding when training camps can start and when veteran players can report, along with the CBA-mandated contractual provision obligating players to report in "excellent physical condition" and to "participate fully" in training camp, impose any responsibilities and/or limitations on clubs regarding acclimating players prior to participation in training camp, or any responsibilities on Mr. Stringer to report in condition that would avoid or mitigate the effects of any heat-related illnesses.

In short, the inquiry into the scope and extent of any duties assumed by the NFL under the Guidelines is "inextricably intertwined" with and "substantially dependent" upon an assessment of the CBA obligations imposed on the Vikings, their medical staff and their trainers. That fact alone conclusively demonstrates that Plaintiff's claim is preempted. See Jones v. Gen. Motors Corp., 939 F.2d 380, 382 (6th Cir. 1991) ("Preemption occurs when a decision on the state claim is 'inextricably intertwined' with the consideration of the terms of a labor contract." (quoting Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 213 (1985))); Michigan Mut. Ins. Co. v. United Steelworkers of Am., 774 F.2d 104, 106 (6th Cir. 1985) ("The relevant question under Allis-Chalmers is whether a determination of the

existence and scope of the duty which the defendant allegedly breached is 'substantially dependent' upon analysis of the terms of a collective bargaining agreement.").[5]

B. Plaintiff Continues To Invoke Rights Arising from the CBA.

Plaintiff's claim also fails the second prong of the Mattis/DeCoe test because she seeks to invoke an asserted right of Mr. Stringer to medical care from his employer, the Minnesota Vikings, and its physicans and trainers. See Compl. ¶¶ 1, 16-21, 30. That right arises out of the NFL CBA, which defines "Players' Rights to Medical Care and Treatment." CBA Art. XLIV. Regardless of whether, by publishing the Hot Weather Guidelines in the Game Operations Manual, the NFL voluntarily undertook an obligation with respect to some limited aspect of that medical care, the right to such care itself still arises out of the CBA, and Plaintiff's claim is accordingly preempted.

In Michigan Mutual Insurance Co., a wrongful death claim stemming from the collapse of a shanty at a steel plant, plaintiff alleged that the union had voluntarily assumed in a collective bargaining agreement a duty under Restatement (Second) § 324A to provide safety services. 774 F.2d at 105. Although the agreement did not specify with particularity how the union was supposed to inspect the plant for safety deficiencies, the Sixth Circuit found the wrongful death claim preempted because "obligations or duties created by a collective bargaining agreement are enforceable only under federal law." Id.; see also NFL Defs.' Mot. to Dismiss at 9-16 (discussing other analogous cases finding

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[5] It bears mention that Plaintiff pursued for several years litigation against the Vikings premised on the assumption that the Club had breached its duty of care, as well as its obligation to provide its player-employees a safe workplace. See Stringer v. Minnesota Vikings Football Club, LLC, 705 N.W.2d 746 (Minn. 2005). Under these circumstances, Plaintiff should not even be permitted to argue that, by issuing the Hot Weather Guidelines in the Game Operations Manual, the NFL "completely supplanted" any of the Club's duties and obligations.

claims preempted). Thus, the fact that the CBA does not explicitly set out the standard of care to be provided for prevention and treatment of heat-related injuries is of no moment; the CBA is the source of the player's right to medical care. See also NFL Defs.' Reply at 2 n.2 and cases cited therein.

III. Plaintiff's Claims Regarding the NFL Defendants' Alleged "Requiring and Approving" Players' Use Of Riddell Helmets Must Be Dismissed.

Plaintiff's Fourth Claim for Relief asserts that the NFL and NFL Properties "required" Mr. Stringer to wear the helmet and shoulder pads that he utilized at the Vikings training camp in July 2001. Compl. ¶¶ 2, 66. That is simply not true, as the attached Declarations confirm. As previously demonstrated, neither the NFL nor NFL Properties regulates, determines or imposes requirements with respect to the use of helmets and shoulder pads in clubs' training camps. See Davey Decl. ¶¶ 5, 7-9; Gertzog Decl. ¶ 4.[6] Moreover, there are no NFL rules or other dictates requiring players to wear Riddell helmets or shoulder pads at any time; indeed, there are no NFL rules or other dictates requiring the wearing of helmets or shoulder pads at all except during NFL games. See Davey Decl. ¶¶ 7-9; Gertzog Decl. ¶¶ 4-7.

Even if an NFL Rule required the use of a helmet and shoulder pads in NFL games and even if that requirement created a duty on the part of the NFL with regard to helmets and shoulder pads at the clubs' training camps, Plaintiff's claim would still be preempted under the DeCoe/Mattis standard. That is because the "right" Plaintiff seeks to invoke in Count IV -- the right to use the equipment of a manufacturer other than Riddell --

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[6] The NFL Rules can be considered on a Motion To Dismiss because Plaintiff's claim (e.g., Compl. ¶¶ 2, 9, 45, 66) necessarily relies on them in alleging that it was a "requirement" that Mr. Stringer wear Riddell helmets and shoulder pads during training camp. See note 2, supra.

arises out of the CBA-imposed obligation on players to report to training camp and to play in NFL games under NFL Rules. "To be independent of the CBA, a tort claim must allege a violation of a duty 'owed to every person in society,' as opposed to a duty owed only to employees covered by the collective bargaining relationship." Brown v. National Football League, 219 F. Supp. 2d 372, 380 (S.D.N.Y. 2002) (quoting United Steel Workers of Am. v. Rawson, 495 U.S. 362, 371 (1990)). It should go without saying that if the NFL were to impose a requirement regarding the wearing of helmets and shoulder pads by players in clubs' training camps, such a requirement would not apply "to every person in society." Accordingly, claims based upon any such purported requirement, like Plaintiff's Fourth Claim for Relief, would be preempted.

Preemption is also required because resolution of the claim set forth in Count IV would require interpretation of the CBA. The NFL Rules are referenced in, and therefore incorporated by reference into, the CBA. See pp. 6-7, supra; Rhoades v. United States, 953 F. Supp. 203, 206 (S.D. Ohio 1996) (claim was preempted when it attempted to invoke employee manuals and procedures referenced in CBA). Cf. Clarett v. NFL, 369 F.3d 124, 142 (2d Cir. 2004) (even if NFL Rule governing eligibility of players for NFL Draft had not been "bargained over" explicitly, it was still covered by the collective bargaining process).

Like claims assertedly based on the Hot Weather Guidelines published in the Game Operations Manual, any claims based on the NFL Rules would be "inextricably intertwined" with the CBA, requiring the Court to interpret various CBA provisions, including (a) the CBA-mandated standard form NFL Player Contract, which requires players to "participate fully in official preseason training camp" and to "comply with and be bound by all reasonable Club rules and regulations" (App. C, ¶¶ 2, 14); (b) the CBA's no-suit provision, which precludes claims "relating to the presently existing provisions of the

Constitution and Bylaws of the NFL as they are currently operative and administered" (Art. IV, § 2), and (c) the CBA provisions creating a Joint Committee on Player Safety and Welfare to address "player safety and welfare aspects of playing equipment" and obligating the Joint Committee to "undertake promptly ... a review of all current materials on the player safety aspects of player equipment ... and other safety matters" (Art. XVIII, §§ 1(a), 1(b)).

CONCLUSION

Accordingly, and for the reasons stated in our initial Memoranda, this Court should dismiss with prejudice the claims against the NFL Defendants because they are preempted by the LMRA.

Respectfully submitted,

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March 15, 2006

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Supplemental Memorandum in Support of the Motion to Dismiss of Defendants National Football League, NFL Properties, LLC, and John Lombardo, M.D., along with the accompanying Declarations of Benjamin C. Block, Tim Davey, and Gary M. Gertzog (with exhibits) was served by the Court's CM/ECF system and by U.S. mail, postage prepaid, on this 15th day of March, 2006, upon the following:

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